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IN THE

Supreme Court of the United States

October Term, 1964

No. 718

LEVIN NOCK DAVIS, SECRETARY STATE BOARD OF ELECTIONS, ET AL.,

Appellants,

vs.

HARRISON MANN, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria

MOTION OF APPELLEES, INTERVENING PETITIONERS BELOW, CHARLES L. GLANVILLE, WILLIAM L. SHEPHEARD, PAUL M. LIPKIN AND JACK R. WILKINS, TO DISMISS THE APPEAL OR AFFIRM THE THREE JUDGE FEDERAL COURT OPINION

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Appellees, intervening petitioners below, Charles L. Glanville, William L. Shepheard, Paul M. Lipkin and Jack R. Wilkins, move to dismiss the subject appeal or affirm the opinion of the three judge Federal Court below on the grounds that the question presented is so unsubstantial as to not need further argument and the opinion below is patently correct.

I.

STATEMENT OF THE CASE

Appellees adopt the jurisdictional statement and postulation of the question contained in appellant's statement of jurisdiction. However, the following statement of the case is submitted:

On November 28, 1962, the Three Judge District Court, with one Judge dissenting, ruled that Virginia's statutes apportioning seats in the Virginia Legislature, as amended in 1962 were unconstitutional, null and void. [1]

At their peril, state officials held elections in 1963 based upon statutes that had been judicially declared void and of no effect.

This Court, on June 15, 1964, [2] affirmed the judgment of the District Court on the merits and remanded the case for further proceedings.

On September 18, 1964, in a unanimous opinion the Court held that since both houses had been elected at a time when a vital part of the election statutes had been declared unconstitutional, the members of both the House of Delegates and the Senate would have to stand for re-election in 1965 to take office in January 1966. (Appellant's Appendix 1)

The Court gave the General Assembly until December 15, 1964, to reapportion itself pursuant to its Order On Mandate. (Appellant's Appendix 4)

The Virginia General Assembly was convened by the Governor on November 30, 1964, and on December 1, the Assembly approved bills reapportion-

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[1] Mann, et al v. Davis, 213 F. Supp. 577
[2] Davis, et al v. Mann, 374 U.S. 803, 84 S.Ct. 1453

ing the House of Representatives and the Senate. (See House Bill 1, Appellees' Appendix 1; Senate Bill 1, Appellees' Appendix 6)

On December 4, the House and Senate concurred in Senate Bill 6, (Appellees' Appendix 9) which provides that if this Court rules on the appeal by March 15, 1965, the Governor, at his discretion, may call for a special election for Senators pursuant to the provisions made and provided for primaries and general elections on the same dates that Virginia will elect members of the House of Delegates, Governor, Lieutenant Governor and Attorney General, as well as other state officers.

If the opinion of this court is handed down after March 15 it will be too late to qualify for primaries and the Governor will select the most practical date for holding a single election for Senators.

II.

ARGUMENT

A

The District Court Opinion Is Correct and Should Be Affirmed

The Virginia General Assembly, unlike the Maryland Assembly, was elected in the face of a decision that held that the districts from whence the members of the Senate and House of Delegates were elected were malapportioned, unconstitutional, null and void.

The body of law and the opinion of this Court hold that an unconstitutional act confers no rights,

imposes no duties and creates no office.[3]

The only way the Senate of Virginia may purge itself of its taint of illegality as created by an election held pursuant to a judicially condemned apportionment statute, is to be re-elected pursuant to a constitutional apportionment statute.[4]

In addition the Court predicted a practical difficulty that would arise in the event of death, where the vacancy in the Senate could not be filled because no election could be conducted under the nullified apportionment statutes.[5]

B

No Substantial Question Exists

This Court on June 15, 1964, handed down five opinions involving constitutional questions pertain-

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[3]Norton v. Shelby Co. (1886) 118 U.S. 178, 6 S. Ct. 1121.
See also:
Coyne v. State (1926) 22 Ohio App. 462, 153 N.E. 876
State v. Gillette (1928) Tex. Com. App. 10 S.W. 2d 984
State ex rel Coe v. Harrison (1927) 217 Ala. 80, 114 So. 905
Johnston v. Dunworth (1907) 127 Mo. App. 377, 105 S.W. 1055
Commonwealth v. Fugate (1830) 2 Leigh 724

[4]District Court Opinion (Appellant's Appendix 2)

"As noted, however, the 1963 Senate would not normally leave office until January 1968. Elected on a void pattern of representation, there is no warrantable foundation for its accreditation beyond January 1966. Further, if it should be allowed to survive until 1968, the General Assembly — from January 1966 to January 1968—would be composed of a House of Delegates elected on one (a valid) scheme of apportionment with a Senate elected upon another (invalidated) plan. This too, would be constitutionally unjustifiable. Together the two houses in a bicameral system form a unitary and entire legislature. For equality of popular representation they are mutually complementary, and constitutional validity is not fulfilled if one house is deliberately permitted to lag behind the other in seeking fairness of representation. Cf. Maryland Committee v. Tawes, supra, 377 U.S. 656, 673)"

[5]State Senator Charles Moses died November 17, 1964, representing the 11th Senatorial District.

ing to state representation.[6] Having decided the constitutional questions involved, the implementation of the opinions was left to lower courts to administer.

Where an equitable decree has been rendered by the lower court on mandate, a review would only serve to delay the effective and orderly implementation of the constitutional principles contained in the opinions of this Court.

This Court announced the principle in the instant case, the District Court has implemented the same and the Legislative body involved has provided for orderly election processes, which will be assisted by a dismissal of this appeal or an affirmance of the District Court's opinion as soon as practicable prior to March 15, 1965.

III.

CONCLUSION

Appellees submit that no substantial federal question is presented by this appeal, the District

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[6] Davis, et al y. Mann, 374 U.S. 803, 84 S. Ct. 1453
Lucas, et al v. Forty-Fourth General Assembly of Colorado, 375 U.S. 938, 84 S. Ct. 1472

Maryland Committee for Fair Representation, et al v. Tawes, 374 U.S. 804, 84 S. Ct. 1442

WMCA, Inc., et al y. Lomenzo, et al, 370 U.S. 190, 84 S. Ct. 1418
Reynolds, et al v. Sims, et al, 374 U.S. 802, 84. S. Ct. 1362.

Court opinion is patently correct and should be affirmed.

Respectfully submitted,

CHARLES L. GLANVILLE, WILLIAM L. SHEPHEARD, PAUL M. LIPKIN AND JACK R. WILKINS,

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PROOF OF SERVICE

I, Henry E. Howell, Jr., one of the attorneys for the appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of December, 1964, I served copies of the foregoing Motion Of Appellees To Dismiss The Appeal Or Affirm The Three Judge Federal Court Opinion on the several appellants hereto by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

Robert Y. Button, Esquire
State Supreme Court—Library Building
Richmond, Virginia

R. D. McIlwaine, III, Esquire
State Supreme Court—Library Building
Richmond, Virginia

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Richmond, Virginia

HENRY E. HOWELL, JR.,
Attorney for Appellees.

HOUSE BILL NO. 1

CHAPTER

An Act to amend and reenact § 24-12, as amended, of the Code of Virginia, relating to apportionment of the members of the House of Delegates.

[H 1]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 24-12, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-12. Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

**First.—Chesapeake, two.*

Second.—Accomack and Northampton, one.

Third.—Albemarle and Greene, one.

Fourth.—Charlottesville, one.

Fifth.—Alexandria, two.

Sixth.—Alleghany, *Botetourt*, Covington and Clifton Forge, one.

Seventh.—Amelia, * *Lunenburg* and Nottoway, one.

Eighth.—Amherst and Lynchburg, one.

Ninth.—Arlington, * *four.*

Tenth.—Augusta, Highland, Staunton and Waynesboro, two.

Eleventh.—Bedford, one.

Twelfth.—Bland, * *Craig*, Giles, *Pulaski and Wythe*, * *two.*

**Thirteenth.—Danville and Pittsylvania*, one.

Fourteenth.—Brunswick and * *Dinwiddie*, one.

Fifteenth.—Buchanan, one.

Sixteenth.—Russell and Dickenson, one.

**Seventeenth. — Roanoke City and Roanoke County*, one.

Eighteenth.—Campbell, one.

Nineteenth—Caroline, King George, Essex and King and Queen, one.

**Twentieth.—Fairfax County, and the cities of Alexandria, Fairfax and Falls Church*, one.

Twenty-first.—* James City, * York and Williamsburg, one.

Twenty-second. — Charlotte, *Cumberland* and Prince Edward, one.

Twenty-third. — Chesterfield and Colonial Heights, * *two.*

Twenty-fourth. — Clarke, Frederick and Winchester, one.

Twenty-fifth.—Danville, one.

Twenty-sixth.—Hampton, * *two.*

Twenty-seventh.—Fairfax *County*, and cities of Fairfax and Falls Church, * *six.*

Twenty-eighth.—Fauquier, *Warren* and Rappahannock, one.

Twenty-ninth.—Fluvanna, Goochland, * Louisa *and Powhatan*, one.

Thirtieth.—Franklin *County and Floyd*, one.

Thirty-first.—Gloucester, Mathews, *New Kent, Charles City* and Middlesex, one.

Thirty-second. — *Carroll*, Grayson and Galax, one.

Thirty-third.—Greensville, *Surry* and Sussex, one.

Thirty-fourth.—Halifax and South Boston, one.

Thirty-fifth.—Hanover and King William, one.

Thirty-sixth. Henrico, * *and city of Richmond, eight.*

Thirty-seventh.—Henry, Patrick and Martinsville, two.

Thirty-eighth.—Isle of Wight, * *Southampton* and * *city of Franklin*, one.

Thirty-ninth. — Northumberland, Westmoreland, Lancaster and Richmond County, one.

Fortieth.—Newport News, three.

Forty-first.—Lee, Wise, and city of Norton, two.

Forty-second.—Loudoun *and Prince William*, * *two.*

Forty-third.—Lynchburg, one.

Forty-fourth.—Madison, Culpeper and Orange, one.

Forty-fifth.—Mecklenburg, one.

Forty-sixth.—Montgomery and Radford, one.

Forty-seventh.—Nansemond and Suffolk, one.

Forty-eighth. — Nelson *, *Appomattox and Buckingham*, one.

**Forty-ninth.*—Norfolk City, * *seven.*

**Fiftieth.*—Page *, *Rockingham, Shenandoah and Harrisonburg*, one.

**Fifty-first.*—Petersburg *, *one.*

**Fifty-second.*—Pittsylvania, * *one.*

**Fifty-third.*—Portsmouth, * *three.*

**Fifty-fourth.*—Prince George * and Hopewell, one.

**Fifty-fifth.*—* Virginia Beach, two.

**Fifty-sixth.*—Roanoke County, one.

**Fifty-seventh.*—Roanoke City, two.

**Fifty-eighth.* — Rockbridge, Bath and Buena Vista, one.

**Fifty-ninth.*—Rockingham and Harrisonburg, * *one.*

**Sixtieth.*—Smyth, one.

**Sixty-first.* — Spotsylvania, Stafford and Fredericksburg, one.

**Sixty-second.*—Tazewell, one.

**Sixty-third.*—Washington, Scott and Bristol, two.

And the districts hereby created are hereby

numbered one (1) to * *sixty-three* (*63*) inclusive.

The reference to a county or city in this section is to the area comprising such county or city as of January one, nineteen hundred sixty-five. 2. If any part or parts, section, subsection, sentence, clause or phrase of this act or the application thereof to any person or circumstance is for any reason declared unconstitutional, such decisions shall not affect the validity of the remaining portions of this act which shall remain in force as if such act had been passed with the unconstitutional part or parts, section, subsection, sentence, clause, phrase or such application thereof eliminated; and the General Assembly hereby declares that it would have passed this act if such unconstitutional part or parts, section, subsection, sentence, clause or phrase had not been included herein, or if such application had not been made.

SENATE BILL NO. 1

CHAPTER

An Act to amend and reenact § 24-14, as amended, of the Code of Virginia, relating to State senatorial districts.

[S 1]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 24-14, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-14. The State is hereby divided into * *thirty-three* districts entitled to senators as follows:

First.—The counties of Accomack, Northampton, * *Mathews, Gloucester and York*, one.

Second.—Norfolk city, * *three.*

Third.—* *The cities of Chesapeake, Portsmouth and Virginia Beach, three.*

Fourth.—The counties of Halifax, Charlotte, * Prince Edward, *Lunenburg and Nottoway* and the city of South Boston, one.

Fifth.—The counties of Isle of Wight, Nansemond, Southampton and the cities of Suffolk and Franklin, one.

Sixth. — The counties of Greensville, *James City*, Prince George, Surry and Sussex, and the * *cities* of Hopewell *and Williamsburg*, one.

Seventh.—The counties of Brunswick, * *Din-*

widdie and Mecklenburg, *and the city of Petersburg*, one.

Eighth.—The counties of * *Arlington and Fairfax, and the cities of Fairfax and Falls Church*, one.

Ninth.—Arlington county, one.

**Tenth.*—The counties of Appomattox, Buckingham, * Amherst, Nelson and * *Campbell*, one.

**Eleventh.* — * *Bedford* County and city of Lynchburg, one.

**Twelfth.*—The counties of Henry, Patrick and Pittsylvania and the cities of Danville and Martinsville, two.

**Thirteenth.*—The counties of * Carroll, Floyd, * *Franklin and Montgomery*, and the **cities* of Galax *and Radford*, one.

**Fourteenth.*—The counties of Washington, Lee and Scott and the city of Bristol, one.

**Fifteenth.*—The counties of Dickenson, *Russell* and Wise and the city of Norton, one.

**Sixteenth.* — The counties of Buchanan, * *Smyth* and Tazewell, one.

**Seventeenth.*—The counties of Bland, Giles, Pulaski, *Craig*, *Grayson* and Wythe, one.

**Eighteenth.* — The counties of Alleghany, * *Bath*, Botetourt, * and * *Roanoke*, and the cities of * Clifton Forge and Covington, one.

**Nineteenth.* — The counties of Augusta, * *Rockbridge* and Highland, and the cities of *Buena Vista*, Staunton and Waynesboro, one.

*Twentieth.—The counties of Page, Rappahannock, Rockingham and Warren, and the city of Harrisonburg, one.

*Twenty-first.—The counties of Clarke, Frederick, Shenandoah *and Loudoun* and the city of Winchester, one.

*Twenty-second.—The counties of Albemarle, Fluvanna, Greene, *Cumberland, Powhatan* and Madison, and the city of Charlottesville, one.

*Twenty-third. — The counties of Goochland, Louisa, Orange, *Spotsylvania, *Culpeper, Caroline, King George* and the city of Fredericksburg, one.

*Twenty-fourth.—The county of Fairfax and the cities of Fairfax and Falls Church, two.

*Twenty-fifth.—The counties of * Prince William, * Stafford and *Fauquier*, one.

*Twenty-sixth. — The counties of * Hanover, King William, Essex, King and Queen, Middlesex, *Westmoreland, Northumberland, Richmond and Lancaster*, one.

*Twenty-seventh.—City of Newport News *, one.

*Twenty-eighth.—City of Hampton, one.

*Twenty-ninth.—The counties of Charles City, Chesterfield, * *Amelia* and New Kent and the * *city* of Colonial Heights *, one.

*Thirtieth.—Richmond city, two.

*Thirty-first.—County of Henrico, one.

*Thirty-second.—City of Roanoke, one.

*Thirty-third.—City of Alexandria, one.

SENATE BILL NO. 6

CHAPTER

An Act to amend the Code of Virginia by adding a section numbered 24-13.1 to provide for the election in nineteen hundred sixty-five of members of the Senate of Virginia for terms expiring in January nineteen hundred sixty-eight; and to provide how members of the Senate of Virginia shall be elected for terms commencing in January nineteen hundred sixty-eight and thereafter.

[S 6]

Approved

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding a section numbered 24-13.1 as follows:

§ 24-13.1 (a) Notwithstanding the provisions of § 24-13 of this Code, if the Attorney General of Virginia shall file with the Clerk of the Virginia State Senate a copy of an order of the Supreme Court of the United States, or other federal court, finally adjudicating that the terms of the incumbent members of the Senate of the General Assembly of Virginia terminate on or before the convening in January, nineteen hundred sixty-six, of the regular session of the General Assembly, the Governor shall issue a writ calling a special election to elect the several members of the State Senate. The writ shall set forth the date of the election. All other provisions of law relating to the conduct of special elections

shall apply. At such special election, the candidates for election to the several State Senatorial Districts, as such Districts are then legally constituted, receiving the highest number of votes, respectively, shall be declared elected, and shall, upon qualifying for office, constitute the Senate of the General Assembly. Provided, however, if the Attorney General of Virginia shall file the copy of the order hereinabove-mentioned with the Clerk of the Virginia State Senate on or before the fifteenth day of March, nineteen hundred sixty-five, the Governor, in his discretion, is authorized to issue the writ calling an election to elect the several members of the State Senate on the date of the general election in November, nineteen hundred sixty-five. In such event, except as herein modified, all other provisions of law providing for primaries or conventions to nominate persons as candidates, and for the election of members of the State Senate, shall apply. The persons so elected and qualifying shall hold office for a term of two years commencing on the second Wednesday in January succeeding their election and ending upon the convening in January, nineteen hundred sixty-eight, of the regular session of the General Assembly.

(b) Successors to the members of the State Senate elected for terms expiring in January, nineteen hundred sixty-eight, shall be elected in November, nineteen hundred sixty-seven, pursuant to the provisions of § 24-13 of the Code.

(c) This act shall expire as of January ten, nineteen hundred sixty-eight.